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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 89

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

STATEMENT AS TO JURISDICTION

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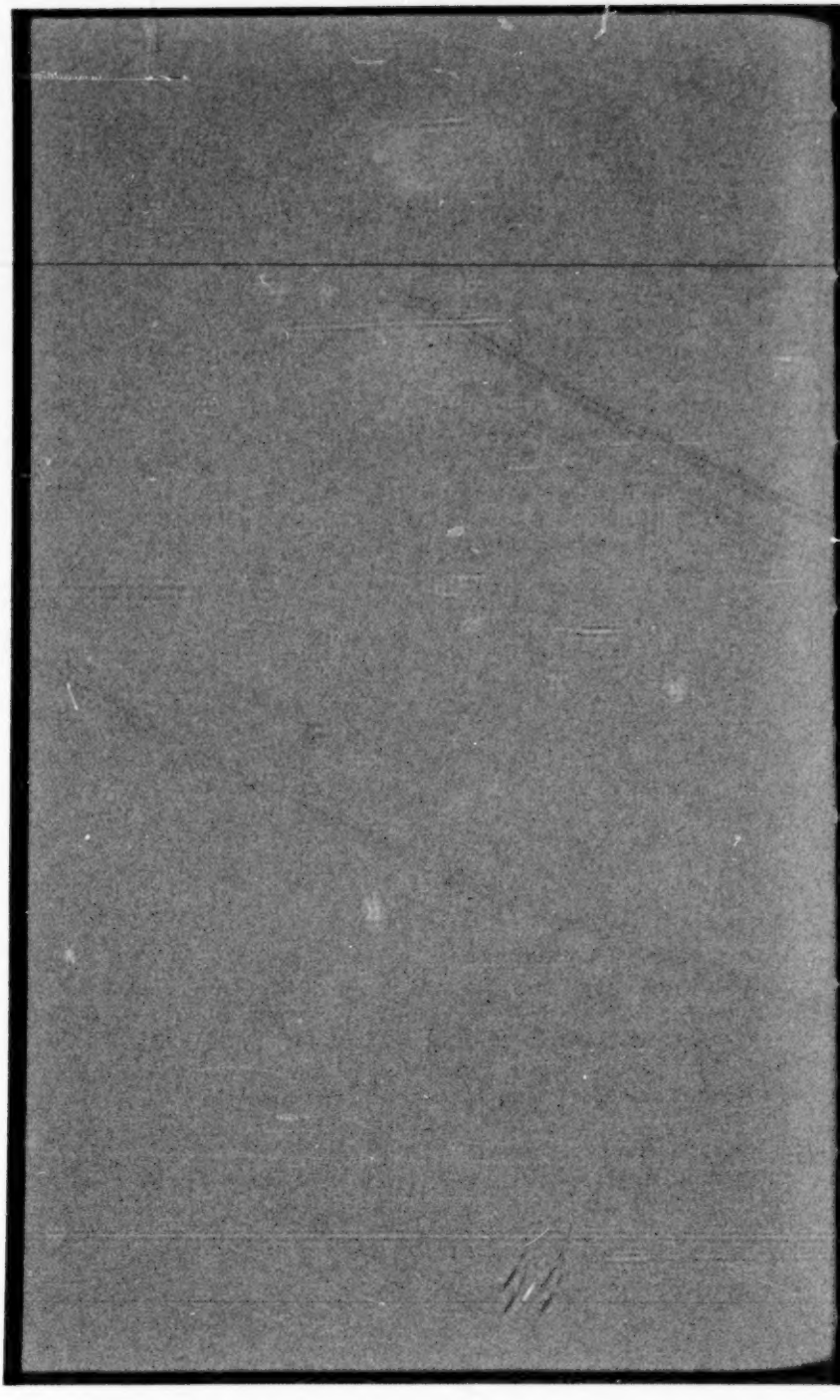

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STATUTES CITED

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 711-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff-Appellee

vs.

ALABAMA PUBLIC SERVICE COMMISSION, C. C. (JACK) OWEN, AS ITS PRESIDENT, AND JIMMY HITCHCOCK AND T. O. WALKER, ASSOCIATE COMMISSIONERS, AND SI GARRETT, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court, the findings of fact, conclusions of law, judgment and decree are reported in 94 F. Supp. 892.

Jurisdiction

The judgment of the District Court was entered on January 19, 1951. A petition for appeal is presented to the District Court herewith, to-wit, on March 14, 1951. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code may be taken from the final decree made by such specially constituted District Court. It is further provided by Title 28, Section 2101(b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railway may not discontinue service unless it first obtains a certificate from the State Public Service Commission allowing such discontinuance, and after hearing and consideration the Commission declines to grant such certificate and the railway files a complaint asking an injunction of a three-judge Federal Court:

a. Does a three-judge Federal Court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three-judge Federal Court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought is an injunction

enjoining the Public Service Commission and other state officers from enforcing any penalties or remedies provided under state law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming arguendo that there is jurisdiction for a three-judge federal court, should the court abstain from exercising it to enjoin enforcement of state criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the state law?

d. Assuming arguendo that there is a jurisdiction for a three-judge federal court, should the court abstain from exercising its jurisdiction in recognition of the wisdom of allowing state courts to try questions of local state policy relating to complicated questions of fact?

e. Where the suit is to enjoin the Alabama Public Service Commissioners and the Attorney General of Alabama from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the State because of the failure to observe the provisions and requirements of the order of the Commission, and where there has been no suit on the part of the Commissioners or the Attorney General to enforce said order, is the suit against the Commissioners and the Attorney General in substance against the State of Alabama, and, therefore, barred by the United States Constitution, Amendment XI?

f. May a three-judge federal court properly find that confiscation had resulted because of losses on a branch railroad line, without considering the effect of those losses on the overall financial operations of the railroad system as a whole?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 34, 35, 50, 51, 76, 77, 78, 79, 81, 82, 83, 84, 86, 88, 90, 94, 95, 96, 97, 98,

104, 105, 106, 110, 399, 400, 405; United States Code, Title 28, Sections 1253, 2101(b), 2281 and 2284. The said statutory provisions, or pertinent parts thereof, are set out verbatim or appropriately summarized in Appendix "A" hereto.

Statement

Appellee has operated trains between Birmingham, Alabama and Calera, Alabama as part of its railroad system. By petition filed on December 12, 1949, appellee petitioned the Alabama Public Service Commission (hereinafter referred to as the "Commission") for permission to discontinue the operation of train Nos. 46-85 and 47-86 operating between the above cities, pursuant to the requirements of Title 48, Sections 35 and 106, Code of Alabama 1940, which require that no transportation company shall abandon any of its service to the public without first filing application for permit to abandon service and obtaining from the Commission a permit allowing such discontinuance. On March 8, 1950 the application was heard by the Commission. On Sept. 8, 1950 the Commission entered an order denying appellee's application for authority to discontinue the branch line in question, it being alleged by the appellee that said order of the Commission was not received by appellee until October 7, 1950. Appellee did not apply for rehearing under Title 48, Section 76, Code of Alabama 1940; appellee did not appeal from the Commission's order, pursuant to Title 48, Sections 79 et seq., Code of Alabama 1940; appellee did not sue for an injunction in the Alabama courts, pursuant to Title 48, Sections 94 et seq., Code of Alabama 1940. Nor did appellee attempt to avail itself of the supersedeas provisions in the Alabama statutes (Title 48, Sections 81 and 84, Code of Alabama 1940). Sec. 82 of Title 48, supra, provides that the appellate court

shall hear the case upon the certified record and shall set aside the order of the Commission if the court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based on findings of fact contrary to the substantial weight of the evidence.

Instead, appellee filed a complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved and upon diversity of citizenship, and asked for convocation of a district court of three judges for a hearing pursuant to the United States Code, Title 28, Secs. 2281 and 2284. Appellee alleged that the revenues received from the operation of the trains in question were disproportionate to the expenses and that the continuation of such trains was not required by public convenience and necessity. There were further allegations that the Commission's order deprived appellee of its property without due process of law, that appellee was being denied equal protection of the laws, that interstate commerce was burdened by the order of the Commission, and that the order was unjust and confiscatory. Appellee also averred that it had exhausted all of its administrative remedies.

Paragraph 4 of the complaint contained a purely frivolous attack on the constitutionality of Title 48, Secs. 35 and 106, Code of Alabama 1940, appellee not asking for an adjudication of the constitutionality of those statutes. Defendants-appellants filed three motions with the three-judge federal court. First, defendant filed a motion to stay the call of a three-judge district court; second, a motion to stay the proceedings in the three-judge district court; and third, a motion to dismiss the cause of action. The court, in its final judgment of January 19, 1951, over-

ruled each motion. A hearing was also had and evidence taken and the case submitted on appellee's prayer for a permanent injunction. In its final decree of January 19, 1951, the three-judge court held that the order of the Public Service Commission denying permission to discontinue the trains in question was null, void, and of no effect, and the court vacated that order. The court further ordered, adjudged and decreed that the defendants, together with their successors in office, and their agents, servants, and attorneys be permanently enjoined from taking any steps or proceedings of any nature whatsoever against the appellee, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff-appellee, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the order of the Commission by discontinuing the daily operation of the trains in question.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised in several cases before this Court:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496 (1941);

Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943);

Beal et al. v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45 (1941);

Ex parte Bransford, 310 U. S. 354 (1940);

Chicago v. *Fieldcrest Dairies*, 316 U. S. 168 (1942);

Meredith v. *Winter Haven*, 320 U. S. 228 (1943);

Spector Motor Service v. *McLaughlin*, 323 U. S. 101 (1944);

Stainback v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949);

Ford Motor Co. v. *Department of Treasury*, 323 U. S. 459 (1945);
Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 (1947);
A. F. of L. v. *Watson*, 327 U. S. 582 (1946).

There are involved the same fundamental issues of how far the federal judiciary has jurisdiction over local questions which can be adjudicated by state courts, and to what extent federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of state courts. The decision of the three-judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that federal courts will stay their hand on local matters until the state courts have ruled.

In addition, there is involved a fundamental issue of whether or not this suit by the appellee against the Alabama Public Service Commission and the Attorney General of Alabama is, in substance, against the State of Alabama, and thus barred by the Eleventh Amendment of the United States Constitution. Further, there is involved the question of whether or not the three-judge federal court has erred in its decision that the order of the Alabama Commission works a confiscation of the railroad's property without due process of law, when the three-judge court has not considered the effect of the branch line losses on the overall system financial operations.

I. The action of the three-judge district court, assuming jurisdiction in this cause, was in violation of the Eleventh Amendment of the United States Constitution. Alabama

had not waived its immunity against such suit. It was not alleged in the complaint that the officials of the State of Alabama were enforcing, or seeking to enforce, unconstitutional state statutes (the allegations of unconstitutionality were admittedly frivolous and, therefore, may be disregarded). The State action, which the railroad seeks to have enjoined in the federal courts, is potentially future action and it is not certain that such action will occur. The railroad seeks to have enjoined the Commissioners and the Attorney General from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the State because of the railroad's failure to continue the operation of the trains in question. It is submitted that such an attack does not bring the railroad within an exception to the Eleventh Amendment prohibition. This potential future action, which the railroad seeks to have enjoined, would constitute action by the officers as the State of Alabama. The officials would not be acting in their individual capacities.

Ford Motor Co. v. *Department of Treasury*, 323 U. S. 459 (1945);

Cf. Beal v. *Missouri Pacific R. Corp.*, 312 U. S. 45 (1941);

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949);

Chicago R. I. and P. R. Co. v. *Long et al.*, (8th Cir. 1950) 181 F. 2d 295.

II. The decision below is in conflict with *Beal et al.* v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State and withdrawing the determination of the legal ques-

tion involved from the state courts whose appointed function it is to decide it. In the present case the railroad has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact there has been no move on the part of any state officer to enforce the statute at all. The case also notes that even if an adverse decision were rendered in the state court causing large penalties to be assessed against the railroad, such penalties might well be the consequence of violation of state law.

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the state.

Shipman v. *Dupre*, 339 U. S. 323 (1950);
Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496 (1941);
Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943);
Chicago v. *Fieldcrest Dairies*, 316 U. S. 168 (1942);
A. F. L. v. *Watson*, 327 U. S. 582 (1946);
Township of Hillsboro v. *Cromwell*, 326 U. S. 620 (1945);
Stainback v. *Mo Hock Ke Lok Po.*, 336 U. S. 368 (1949);
Cf. Meredith v. *Winter Haven*, 320 U. S. 228 (1943);
Cf. Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 (1947).

The same thread runs through all of the above cases, that to avoid needless friction with state policies the federal judiciary should exercise a wise discretion giving due regard to the rightful independence of the state government and the smooth working of the federal judiciary. This is especially so where the railway is actually seeking to escape the impact of statutes, the constitutionality of which it ad-

mits is properly for consideration by the Supreme Court of the State.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided state law involved. But *Burford* v. *Sun Oil Co., supra,* indicates that there is no such limitation, so long as there are "basic problems of state policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and Alabama courts is made clear by the fact that this is the one of a series of such cases by railroads filed in the same judicial district, seeking the same relief.

The three-judge district court erred in finding confiscation in violation of due process without determining the effect on the system operations as a whole of losses on the branch line in question. See: *A. P. S. C.* v. *Atlantic Coast Line R. Co.,* 253 Ala. 559, 45 So. 2d 449 (1950).

Conflicts dangerous to the success of state policies have resulted from the intervention of the lower federal court in the case at bar. It has issued permanent injunctions against action by Alabama administrative officials regarding the railroad lines here involved. No conceivable changed circumstances would mitigate a contempt citation if Alabama administrative officials took such future action. The lower court has substituted its independent judgment for that of the Alabama Commission. Yet, the Alabama legislature, in a carefully devised regulatory scheme, had severely limited the scope of the review which the Alabama courts may exercise over actions of the Alabama Public Service Commission. See: Tit. 48, Secs. 79 *et seq.,* Code of Alabama 1940; *Avery Freight Lines* v. *Persons,* 250 Ala. 40, 32 So. 2d 886 (1947); *Alabama Public*

Service Comm. v. *Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. 2d 449 (1950). And neither the appellee, *Louisville and Nashville Railroad Company,* nor the lower court has attacked the Alabama review procedures as inadequate.

Respectfully submitted,

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APPENDIX "A"

ALABAMA STATUTES

Code of Alabama 1940, Title 48:

Sec. 34. Facilities, equipment, improvements and maintenance required.—Every utility shall maintain its plant, facilities and equipment in good operating condition and shall set up and maintain proper reserves for renewals, replacements and reasonable contingencies. Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve.

Sec. 35. Abandonment of service, regulated.—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 50. Attorney general to represent commission; special counsel provided for.—The attorney general shall represent the public service commission in any and all legal proceedings which it may have the power to institute and which, pursuant to such power, it has instituted, and in all legal proceedings against it, and shall institute such legal proceedings which the commission may request or deem necessary, provided it has the power to institute them, to enforce the provisions of this title or compel obedience to and observance of the same by any person, firm, company, or corporation, upon which such obedience or observance is imposed. The attorney general with the approval of the governor may employ any special counsel to institute or

defend such legal proceedings or to assist the attorney general therein, and to contract with the special counsel concerning a reasonable compensation for his or their services, which compensation shall be paid out of the treasury on a warrant drawn by the comptroller on the treasury upon approval by the governor.

Sec. 51. Actions to enforce penalties or forfeitures.—Unless otherwise in this title provided, all actions to enforce penalties or forfeitures under this title shall be brought in the name of the State of Alabama in a court of competent jurisdiction in Montgomery county, Alabama. Whenever any utility is subject to a penalty or forfeiture under this title, the commission shall certify the facts to the attorney general, who shall institute and prosecute an action for recovery of such penalty; provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. All penalties and forfeitures recovered by the state in such actions shall be paid into the treasury to the credit of the general fund.

Sec. 76. Rehearings.—At any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such a rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 77. Time allowed commission for making decision.—The commission shall within ninety days after the completion of the hearings and arguments, if any, and the filing of briefs, if any, in any case submitted to it, or upon a rehearing thereof, decide said cause, or if for any good and

valid reason it shall be unable to decide the same within said period, then at the expiration of said ninety day period, the commission shall make and file and serve upon all the interested parties a written order stating its reason for its inability to decide said cause within said time, and may extend the time for decision for a period not to exceed ninety days.

Sec. 78. Courts may compel compliance with orders of commission and punish failure.—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the circuit court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama.

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided

for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon a finding of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings.

Sec. 83. Certificate of record or transcript.—Within thirty days after the perfecting of the appeal as aforesaid, and sooner if practicable, the public service commission, through its president or any member thereof, or its secretary, shall certify to the appellate court under the seal of the commission a complete record or transcript of all the proceedings had before it, including all orders and pleadings together with a transcript of all oral testimony, and the original or a transcript of all documentary evidence taken in the proceeding in which the order appealed from was made. The time for certifying said transcript to said appellate court may be extended by an order of the judge thereof, for good cause shown.

Sec. 84. Appeal does not supersede order; supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares or charges, or any

of them, or any schedule, or part or parts of any schedule of such rates, fares, or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Sec. 86. Penalty and condition of bond.—The bond required by the two preceding sections shall be double the sum so estimated with two or more sureties, one of which may be a surety company, to be approved by the judge, payable to the State of Alabama and conditioned to pay all such loss or damage as any person, firm or corporation may sustain, including all such excess rates, fares or charges, as such person, firm or corporation may have paid pending said appeal or any subsequent appeal to the supreme court in the event the order or action of the public service commission shall be sustained.

Sec. 88. Effect of supersedeas bond.—From the time said bond shall have been given the order appealed from shall be stayed and superseded and it shall be lawful for the utility to charge the rates, fares, or charges which had been reduced by said order, or the rates, fares or charges sought to be established by its petition, until the final disposition of said cause. If said utility shall fail after thirty days' written notice to give such additional bond at the end of each six months, pending said appeal, and pending any subsequent appeal to the supreme court, the stay or supersedeas shall terminate, and the rates, fares, or charges established by statute or by the public service commission or by the order or action appealed from, shall be revived and shall be the lawful rates pending all further proceedings in the cause.

Sec. 90. Appeal to supreme court by either party.—Either party may appeal to the supreme court of Alabama from the judgment or decree of the lower court, the appeal to be taken within thirty days from the rendition of said judgment or decree, under the same rules and regulations

as are or may be provided by law for appeals from said court, except as herein provided.

Sec. 94. Bond for injunction or restraining order, condition of.—No judge or court shall grant any preliminary injunction or interlocutory order or decree or process suspending or restraining any rate or order of the public service commission entered pursuant to the provisions of this title, without requiring as a condition precedent to the issue of such injunction, decree, order, or process, that the company, corporation, or person seeking the same shall, if the injunction or restraining order applied for is for the purpose of restraining the enforcement of any such rate or order, execute and file with the clerk or register of said court a good and sufficient bond with sureties, payable to the State of Alabama, in like amount and payable as provided in respect to supersedeas bonds. The failure to give the injunction bond or subsequent bonds as provided for in this subdivision shall immediately vacate and render null and void such injunction or restraining order or decree.

Sec. 95.—Notice of injunction or restraining order to commission.—No preliminary injunction or interlocutory order, or decree or process suspending or restraining or affecting the enforcement of any action, order or determination of the commission shall be granted by any judge or court, except upon hearing, after at least five days' notice to the commission.

Sec. 96.—Bonds for restraining or suspending orders of public service commission; condition of.—The bonds required to be given as a condition precedent to the issue of restraining orders or injunctions shall be filed with the clerk of said court and be payable to the State of Alabama and conditioned to pay all damages that any person, firm, company, or corporation shall sustain by reason of the enjoining or restraining of the enforcement of such order or orders, in the event the injunction shall be dissolved or vacated, or for any reason cease to be operative.

Sec. 97.—Appeal to supreme court from injunction.—Either party may appeal to the supreme court from the judgment or decree of the trial court in such proceedings,

such appeal to be taken within thirty days from the rendition of such judgment or decree.

Sec. 98. Appeal bond in injunction cases.—If the utility desires to take an appeal from the judgment or decree of the trial court and to supersede the same, it shall give, in addition to security for costs, a bond with two or more individual sureties or one surety company, to be approved by the clerk or register of the court, which bond shall be in an amount and with the conditions to be prescribed by the judge, and the same shall be payable as prescribed by law.

Sec. 104. Commission charged with duty of regulating and controlling transportation companies.—The public service commission is charged with the duty of supervising, regulating, and controlling, all transportation companies doing business in this state, in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies, and the commission shall, from time to time, prescribe and enforce against said transportation companies, in the manner herein authorized, such rates, charges, classifications of freight, storage demurrage, and car service charges, rules, and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules, and regulations adopted or acted upon by any transportation company inconsistent with those prescribed by the commission acting within the scope of its authority, or inconsistent with those prescribed by any statute, shall be unlawful and void. And the commission shall enforce and require compliance with all the provisions of all laws now in force or hereafter enacted regulating railroads and other transportation companies or prescribing the duties thereof.

Sec. 105. Certificate of convenience and necessity.—No transportation company shall undertake the extension of its service or the construction of a new plant, property, or facility, except ordinary extensions in the usual course

of business, or shall acquire or operate any line, plant, or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require, or will require, or the public interest will be best served by, such extension, construction, acquirement, operation, or acquirement and operation.

Sec. 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 110. Repairs and improvements of facilities and property of transportation companies.—If, in the judgment of the public service commission, repairs or improvements to or changes in any trains, switches, terminals, or terminal facilities, motive power, or any other property or device used by any transportation company, subject to the supervision of the public service commission, in or in connection with the transportation of passengers, freight or property, ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight or property, the commission shall, after a hearing had either on its own motion or after complaint filed, make and enter an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every transportation company subject to the supervision of said commission shall make all such repairs, improvements, changes and additions required of it by an order of the commission served on it,

and any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation each and every day's continuance thereof shall be a separate and distinct offense.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's orders, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense.

Sec. 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any

such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court.

Sec. 405. Violating orders of public service commission; penalty for.—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case.

UNITED STATES STATUTES

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Sec. 2281. Injunction against enforcement of State statute; three judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable dam-

age. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 711

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA, *Defendants*

Before Leon McCord, Circuit Judge, and Charles B. Kennamer and Seybourn H. Lynne, District Judges.

Per CURIAM:

This Court having considered and undertood the motions filed by the defendants: (a) to stay the call for a three judge court, (b) to stay the proceedings in this Court, and (c) to dismiss the cause of action, is of the opinion that said motions should be overruled and denied.

Sou. RR. Co. vs. Ala. Pub. Serv. Com. et al., 88 F. Supp. 441.
Sou. RR. Co. vs. Ala. Pub. Serv. Com. et al., 91 F. Supp. 980.
At. C. Line vs. Ala. Pub. Serv. Com. et al., 92 F. Supp. 579.
L. & N. RR. vs. Ala. Pub. Serv. Com. et al., 93 F. Supp. 544.

The Plaintiff, the defendants, the law, and the material facts in this action are the same as in L. & N. RR. Co., vs. Ala. Pub. Serv. Comm., et al., 93 Fed. Supp., 544.

FINDINGS OF FACT

Plaintiff, operating train 46-85 between Birmingham, Alabama, and Calera, Alabama, via Oneonta, Gadsden, Anniston, Talladega, Sylacauga, and other intermediate

points in Alabama; and train 47-86 over the same route in reverse, petitioned the defendant Public Service Commission for authority to discontinue the operation of such trains due to the heavy financial loss occasioned by the operation of these trains, losses which indicate that such service is not substantially used or needed by the public.

2. Plaintiff's petition was denied by the defendant Public Service Commission and the plaintiff is here seeking injunctive relief.

3. Plaintiff is now, and has been for several years, operating these trains at a heavy financial deficit, the deficit running as high as $10,000.00 per month over the period July 1, 1948 to September 30, 1949.

4. The public use of these trains has been small, and between many points the service has been practically abandoned by the public.

5. The territory served by these trains is also served by other and better trains, or buses, or is on or near improved highways.

6. The order of the defendant Commission is affirmative in nature and is having the practical effect of confiscating plaintiff's property in violation of the 14th Amendment of the United States Constitution.

Conclusions of Law

The court adopts herein the Conclusions of law as stated in Sou. RR. Co. vs. Ala. Pub. Serv. Comm., et al., 88 Fed. Supp., 441, and 91 Fed. Supp., 980; Atlantic Coast Line RR. vs. Ala. Pub. Serv. Comm., et al., 92 Fed. Supp., 579; and L. & N. RR. Co., vs. Ala. Pub. Serv. Comm., et al., 93 Fed. Supp., 544

Opinion

The evidence before this court shows so clearly that the traveling public has, to such a great extent, abandoned the use of the two local passenger trains as to leave no proper grounds for requiring the plaintiff to continue the operation of these trains at the heavy financial loss the evidence discloses.

When it is clearly shown that the public has discontinued the use of the public utility, and the continued operation is so burdensome, the doctrine of public convenience and necessity does not apply.

LEON MCCORD,
United States Circuit Judge.
CHARLES B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed January 19, 1951.

O. D. STREET, JR.,
Clerk,
By C. E. SMITH,
Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 711

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Plaintiff,*

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA, *Defendants*

JUDGMENT AND DECREE

This cause coming on to be heard before a duly constituted three judge district court and having been submitted by agreement of the parties for final decree upon the pleading in the cause and upon the evidence offered herein,

including a transcript of the testimony presented at the hearing before the defendant Alabama Public Service Commission, for the reasons set forth in the findings of fact, conclusions of law, and the opinion of the Court filed herein:

It is now ordered, adjudged and decreed this 19th day of January, 1951, as follows, viz:

1. That the motion of the defendants to stay the call for a three judge court, the motion to stay the proceedings in this court, and the motion to dismiss the cause of action, be, and they are, hereby overruled and denied.

2. That the order of the defendant Alabama Public Service Commission, dated October 5, 1950, denying the petition of the plaintiff filed on the 12th day of December, 1949, requesting authority to discontinue the daily operation of trains Number 46-85 and 47-86 between Birmingham, Alabama, and Calera, Alabama, via Oneonta, Gadsden, Anniston, Talladega, Sylacauga, and other intermediate points in Alabama, be, and the same is, hereby vacated and declared to be null, void, and of no effect.

3. That the defendants, Alabama Public Service Commission, Gordon Persons, Its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys, be, and they are, hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by discontinuing the daily operation of plaintiff's passenger trains Nos. 46-85 and 47-86 between Birmingham, Alabama, and Calera, Alabama, via Oneonta, Gadsden, Anniston, Talladega, Sylacauga, and other intermediate points in Alabama, and in reverse from Calera, Alabama, to Birmingham, Alabama; and

4. That the costs of court incurred in this cause be, and the same are, hereby taxed against the defendants, for which execution may issue.

LEON McCORD,
United States Circuit Judge.
CHARLES B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed January 19, 1951.

O. D. STREET, JR.,
Clerk,
By ANNIE SCHOOLAR,
Deputy Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 89

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

W. A. Northcutt,
Robert E. Steiner, Jr.,
Sam Rice Baker,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

Civil Action 711-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION; GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF ALABAMA,

Defendants

APPELLEE'S MOTION TO DISMISS OR AFFIRM AND STATEMENT AS TO JURISDICTION

Appellee, Louisville and Nashville Railroad Company, believing that the matters set forth below demonstrate the lack of substance in the questions raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee also files this its motion to dismiss the appeal, or in the alternative to affirm the judgment of the court below on the ground that the questions raised by appellants are unsubstantial.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal, appellee asserts that the unsubstantial character of the grounds stated by appellants is so apparent as to warrant this court in summarily disposing of this appeal without further hearing. Appellee further shows that the judgment of the court below must, in any event, be affirmed upon the findings of that court as to the confiscatory character of the order of Alabama Public Service Commission sought to be enforced by appellants, but enjoined by the court below.

I

Statement of the Issues on Appeal

Only procedural questions are raised in this appeal by appellants. Appellants have not raised any issue as to the correctness of the decision of the court below on the merits or facts in its holding that the contested order of Alabama Public Service Commission was confiscatory and unconstitutional. The procedural and only issues involved in this appeal are:

(a) Since the complaint prayed for an interlocutory and permanent injunction to restrain the confiscatory and unconstitutional order of Alabama Public Service Commission under an Alabama statute, was a 3-judge court the proper tribunal to hear and decide the case?

(b) Since confiscation of plaintiff's property by the order of Alabama Public Service Commission was alleged and proved, should the 3-judge Federal Court surrender its jurisdiction to state courts where no speedy, plain, and efficient remedy was afforded therein?

(c) Where all material facts showing that the order of Alabama Public Service Commission was confiscatory and unconstitutional were proved, should the Federal Court abandon or decline jurisdiction because

in moulding its decree against the enforcement of such confiscatory and unconstitutional order, incidental relief was granted by enjoining the enforcement of state penalty statutes which would otherwise be applicable to plaintiff-appellee upon its failure or refusal to comply with such order?

(d) Is a proceeding to protect rights guaranteed by the Constitution of the United States from the impact of a confiscatory order of Alabama Public Service Commission a suit against the State of Alabama?

II

Statement of Facts

The facts leading to this litigation are as follows:

For many years, Louisville and Nashville Railroad Company, plaintiff-appellee, has operated passenger trains Nos. 46-85 and 47-86 between Birmingham, Alabama, and Calera, Alabama, entirely within the State of Alabama. In recent years, the operation of these trains has resulted in increasingly large losses because of the competition of other forms of transportation, particularly that of buses and privately owned motor vehicles. L & N could not discontinue trains 46-85 and 47-86 until it received authority from Alabama Public Service Commission, as required by Title 48, Sections 35 and 106, Alabama Code of 1940 (see appendix). If it had discontinued such service without authority, L & N and its officers would be subject to the heavy penalties provided by the applicable Alabama statutes (see appendix).

On November 19, 1949, L & N filed its application with Alabama Public Service Commission for authority to discontinue these trains, in order to eliminate the very heavy losses involved in their operation. After a delay of almost four months, the Alabama Commission set the case for hearing on March 8, 1950. Petitioner introduced evidence in

proof of its case, and the Commission took the case for an order.

Under the law of Alabama (Title 48, Section 77, Code of Alabama of 1940; see appendix), the Alabama Commission is required to decide all cases submitted to it within ninety days from submission, provided that it can extend the time for decision an additional ninety days "for good cause shown." In spite of the delay that had already occurred, and in spite of the heavy losses involved, the Commission extended the time for decision an additional ninety days, which expired on September 7, 1950. Appellee requested immediate action on several occasions, but the Commission did not decide the case until October 5, 1950, and the order was not received by appellee until October 7, 1950—a delay of ten months and seventeen days. The Commission decided the case on the merits and denied, which denial required L & N to continue operation of the trains. The loss, as found by the 3-judge court, was in excess of $10,000 a month, so that the delay of the Commission in deciding the case cost L & N well over a hundred thousand dollars, which loss was irreparable, and which, under the Commission's order, must continue.

Having futilely pursued its "administrative remedies" for 10 months and 17 days without relief, appellee then sought relief by filing its complaint in the Federal Court praying for an interlocutory and permanent injunction, on the ground that the order of the Alabama Commission required the continued operation of these passenger trains, violated the 14th Amendment of the Constitution of the United States by taking its property without due process of law, by confiscating its property without just compensation; and violated Article 1, Section 8, of the Constitution of the United States by imposing an unreasonable burden on

interstate commerce and on interstate freight and passenger rates.

Incidental and ancillary to the primary relief of enjoining the Alabama Commission's order requiring the continued operation of these passenger trains, appellee sought also to enjoin the Commission and the Attorney General of Alabama from enforcing the heavy penalties and sanctions provided by the statutes of Alabama (see appendix) for failure to comply with orders of Alabama Public Service Commission.

By the provisions of 28 U. S. C. A., Sections 2281 and 2284 (see appendix) and the unbroken line of decisions construing these sections, a proceeding to set aside or enjoin the enforcement of an order of a state administrative board or commission, as violative of the United States Constitution, requires the more solemn statutory 3-judge court as distinguished from the District Judge sitting alone. Such court was convened, and by stipulation of the parties the case was submitted on the merits for final decree and injunction as well as on the prayer for an interlocutory injunction. After hearing and considering the evidence, the 3-judge court held the Alabama Commission's order to be confiscatory and unconstitutional, and enjoined defendants from enforcing it or any penalties or sanctions against the railroad because of the discontinuance of the two passenger trains involved.

Appellants seek to contend that the 3-judge court erred in not considering the effect of the losses from these passenger trains on the operation of the system as a whole, but such effort is abortive. The 3-judge court did consider this and found the losses "burdensome" and appellants did not appeal from, and therefore cannot review, this or any other finding of fact.

The Court in its findings, opinion, and order held that the order of the Commission was illegal and confiscatory, and deprived L&N of its rights guaranteed by the United States Constitution. No appeal has been taken from that finding. This case is reported in 94 F. Supp. 892.

III

No Substantial Federal Question Is Presented

Appellants at the outset question the jurisdiction of the 3-judge District Court, on the theory that since appellee did not attack the constitutionality of a state "statute", but instead attacked the constitutionality of the "order" of Alabama Public Service Commission requiring the continued operation of Trains 46-85 and 47-86, there was no jurisdiction in the 3-judge court pursuant to Section 2281, Title 28, U. S. C. (See appendix.)

Section 2281 was formerly Section 380 of Title 28, U. S. C., or Section 266 of the Judicial Code.

This feigned issue was decided against the State's contention in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 292, 67 L. Ed. 659, 661 (1923), in the clearcut opinion written by Mr. Justice Holmes for a unanimous court:

> "A doubt has been suggested whether these cases are within Section 266 of the Judicial Code, Act of March 3, 1911, chap. 230, 36 Stat. at L. 1086, 1162, as amended by the Act of March 4, 1913, chap. 160, 37 Stat. at L. 1013, Comp. Stat. section 1243, 5 Fed. Stat. Anno. 2d ed. p. 984. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting

under and pursuant to the statutes of such state'; but did not change the statement of the ground, which still reads, 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. Louisville & N. R. Co. v. Finn, 235 U. S. 601, 604, 59 L. Ed. 379, 382, P. U. R. 1915A, 121, 35 Sup. Ct. Rep. 146; Phoenix R. Co. v. Geary, 239 U. S. 277, 280, 281, 60 L. Ed. 287-289, 36 Sup. Ct. Rep. 45; Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, November 20, 1922 (260 U. S. 212, ante 217, 43 Sup. Ct. Rep. 75); Western & A. R. Co. v. Railroad Commission, February 19, 1923 (261 U. S. 264, ante, 645, 43 Sup. Ct. Rep. 252). The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. Louiville & N. R. Co. v. Garrett, 231 U. S. 298, 301, 318, 58 L. Ed. 229, 238, 244, 34 Sup. Ct. Rep. 48; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. Ed. 721, 725, 34 Sup. Ct. Rep. 364; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. Ed. 786, 787, 31 Sup. Ct. Rep. 537. But it plainly was intended to enlarge, not to restrict, the law. We mention the matter simply to put doubts to rest."

Other railroads, similarly situated, have applied for and received identical relief from 3-judge Federal courts convened in various states and jurisdictions in the following cases:

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D. C., E. D. Michigan, July 6, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 91 F. Supp. 980 (D. C., M. D. Alabama, July 20, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission,* 88 F. Supp. 441 (D. C., M. D. Alabama, Feb. 8, 1950);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners of Montana,* 78 F. Supp. 1010 (D. C. Montana, 1947);

Atlantic Coast Line R. R. Co. v. *Public Service Commission of South Carolina,* 77 F. Supp. 675 (D. C., E. D. South Carolina, 1948);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana,* 46 F. Supp. 340 (D. C. Montana, 1942);

Great Northern Ry. Co. v. *Nagle,* 16 F. Supp. 532 (D. C. Montana, 1936);

Delaware, L. & W. R. Co. v. *Van Santvoord, et al.,* 232 F. 978 (D. C., N. D. New York, 1916);

Mississippi Railroad Commission v. *Mobile & O. R. Co.,* 244 U. S. 388, 61 L. Ed. 1216 (1917);

Atlantic Coast Line R. R. Co. v. *Ala. Public Service Commission,* 92 F. Supp. 579 (D. C., M. D. Alabama, Aug. 23, 1950);

Louisville & N. R. Co. v. *Ala. Public Service Commission,* 93 F. Supp. 544 (D. C., M. D. Ala., 1950);

Louisville & N. R. Co. v. *Ala. Public Service Commission,* 94 F. Supp. 893 (D. C., M. D. Ala., 1950);

Atlantic Coast Line R. R. Co. v. *Fla. R. R. & P. U. Commission* (D. C. N. D. Fla., March 19, 1951; Case No. 302 Civ. T.).

Obviously these courts were unanimous in their opinion that a 3-judge Federal court had jurisdiction, since in none of those cases was there any dissenting opinion or any hint of doubt that such jurisdiction existed.

Other cases in which the United States Supreme Court held proper the convening of a 3-judge Federal court to

enjoin an order of a state administrative board or commission, following Mr. Justice Holmes in the *Oklahoma Natural Gas* case, are:

Sterling v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375 (1932);
Herkness v. *Irion*, 278 U. S. 92, 73 L. Ed. 198 (1928);
Driscoll v. *Edison Lt. & Pr. Co.*, 307 U. S. 104, 83 L. Ed. 1134 (1938);
Corporation Commission of Oklahoma v. *Cary*, 296 U. S. 452, 80 L. Ed. 324 (1935);
Mountain States Power Co. v. *Public Service Commission*, 299 U. S. 167, 81 L. Ed. 99 (1936).

The order of the Alabama Commission sought to be enjoined by appellee was found and held by the court below to be confiscatory and violative of the 14th Amendment of the Federal Constitution. Appellee had suffered such confiscation, awaiting the hearing of its petition to discontinue these trains and the Commission's delayed decision. It was entitled to a plain, speedy, and efficient remedy to relieve it from further confiscation.

> "Present confiscation is not atoned for by merely holding out the hope of a better life to come."
>
> Mr. Justice Cardozo in *West Ohio Gas Co.* v. *P. U. Comm. of Ohio*, 294 U. S. 79, 83, 79 L. Ed. 773, 777.

It sought and obtained such relief in a Federal Court. In this appeal, the Alabama Commission has not challenged the correctness of the decision of the court below on the merits and the facts of the case that, under the evidence, the order of the Alabama Commission was confiscatory and illegal. Certainly appellants cannot contend that its order challenged and complained of in the court below "had the

quality of a supreme and unchallengeable edict, overriding all conflicting rights of property, and unreviewable through the judicial power of the Federal Government. If this extreme position could be deemed to be well taken, it is manifest that the fiat of [Alabama Public Service Commission], and not the Constitution of the United States, would be the supreme law of the land."—Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U.S. 378, 397, 77 L. Ed. 375, 385.

Undoubtedly, this was a case for a 3-judge court. Even if we were to assume that the 3-judge court did not have jurisdiction over the case, the proceedings before it and its order and judgment would not be void, and the Supreme Court would not order the case dismissed, but would simply reverse and remand the case for an order by the single judge of the District Court below.—*Phillips* v. *U. S.*, 312 U.S. 246, 85 L. Ed. 800 (1941). That Judge was a member of the 3-judge court, and it was he who wrote the opinion of that court in this case. Obviously, he would reach the same conclusion if he were deciding the case alone. Therefore, what does it profit the Alabama Commission to appeal solely from the procedure—not complaining of or attacking the correctness of the decision of the court below on the merits and facts of the case—other than further delay? If appellants contend that this case was one for decision by a single District Judge sitting as a District Court, rather than one for a 3-judge court, then obviously the same result or decision would be reached. If appellants contend that even a single District Judge sitting as a District Court had no jurisdiction over the case, then the entire system of concurrent Federal jurisdiction over violations of the Federal Constitution would cease.

Appellants next contend that the Federal Court should have declined to exercise jurisdiction in this case for reasons of comity.

"Rules of comity or convenience must give way to constitutional rights. * * *

"*As in our opinion the District Court had jurisdiction and a duty to try the question* whether a preliminary injunction should issue, and as that question has not yet been considered, the cases should be remanded to that court, with directions to proceed to the trial." (Emphasis supplied.)

Mr. Justice Holmes in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293, 67 L. Ed. 659, 662.

Other cases holding that the Federal Court properly exercises jurisdiction in cases involving confiscation and Federal constitutional questions are:

Corporation Commission of Oklahoma v. *Cary*, 296 U. S. 452, 80 L. Ed. 324 (1935);

Mountain States Power Co. v. *Public Service Comm. of Montana*, 299 U. S. 167, 81 L. Ed. 99 (1936).

Section 2284(5) of Title 28, U.S.C., furnishes the test of when proceedings in the Federal Court should be stayed, namely, when like proceedings are pending in a state court having jurisdiction thereover. Here, no such proceedings were or are pending in the State courts of Alabama.

Appellants rely heavily on those cases where the Federal courts, in the exercise of their discretion, have abstained from interfering with a state's policy of conserving its own natural resources, as for example the oil proration case of *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424. These cases are *sui generis* and have no application here.

There has been no authoritative declaration by the courts of Alabama that appellee has the right to supersede an order of the Alabama Public Service Commission in a train discontinuance case under the provisions of Title 48, Section 84 (see appendix), and no statement or admission to that effect by the Attorney General of Alabama can in any way bind the courts of Alabama. Thus it cannot be said that

appellee's remedies in the state court are "plain" or "efficient". Appellee sought relief from the state administrative body for ten months and seventeen days, without avail. It sought and obtained relief from the Federal District Court in approximately 55 days. No further comment need be made as to whether state remedies are as "speedy" as Federal in this case. The time for taking an appeal in the state court has expired, so that remedy, so strongly argued by appellants, is non-existent and hence irrelevant. Futhermore, where confiscation is alleged and proved under the Federal Constitution, nothing can preclude the jurisdiction of the Federal Court thereover.

The allegations of appellee in its complaint, and the findings and decision of the court below that the order of the Alabama Commission was confiscatory and unconstitutional are unchallenged in this appeal. Thus the contention of appellants that the court below should decline to exercise jurisdiction because of "complicated questions of fact" is entirely without merit. There is no novel question of state law or state policy involved in this case. There was and is involved in it the question of confiscation under the Federal Constitution. As to the policy of the State, that was decided in *Alabama Public Serv. Comm.* v. *A.C.L.R. Co.*, 45 So.(2d) 449, 451 (Ala. Sup. Ct. March, 1950), where the Court said:

> "There is no other railroad service in that area. There is a good hard surface road and bus service for passengers in all directions, with one truck freight common carrier. *The passenger patronage would not demand a continuance of the railroad service.*" (Emphasis supplied.)

This case is the fifth of a series of like cases in which the Alabama Commission has arbitrarily and unconstitutionally ordered railroads to continue unprofitable passenger service in spite of the policy laid down by the Alabama Supreme

Court; and in all of them such orders have been enjoined by a 3-judge court. The Alabama Commission, by its order in this case, has ignored the pronouncement of the Alabama Supreme Court and the decisions of the 3-judge courts, and it now asks the Supreme Court to make the order of the Alabama Commission, even though confiscatory, supreme by surrendering jurisdiction.

As to enjoining penalties or sanctions: Appellants complain that the court below enjoined them from undertaking to apply any penalties or sanctions against appellee for its failure or refusal to continue the operation of the trains in question. In fact, appellants contend that a Federal Court has no right to enjoin the enforcement of a state criminal law. Such is not an issue here, nor is it involved. The relief sought by appellee's complaint, and the real relief granted by the 3-judge court below, was against confiscation of appellee's property, which would have resulted from requiring the continued operation of trains with such heavy financial losses. The court below found and decided that appellee was entitled to relief, and accordingly enjoined the enforcement of the order of the Alabama Commission. Obviously such relief would be ineffectual if appellee, or its representatives, could be harassed by penalties or prosecutions under any penalty statutes of Alabama for failure to comply with the Alabama Commission's order, which order the court below had set aside and held to be illegal and confiscatory. By this action, the court below made its decree effective.

Clearly this action comes under the well defined exception established by this Court in the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451, 71 L. Ed. 1146, 1150 (1927):

> "* * * But an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both

great and immediate (citing other U. S. Supreme Court cases)".

A similar holding is *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49, 85 L. Ed. 577, 579 (1941). See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322 (1935).

Finally, and apparently as an afterthought, appellants here for the first time argue that this proceeding is a suit against the State of Alabama. That such contention is patently without merit is expressly held in *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714.

Appellee further submits that questions presented in this appeal have been so definitely determined by decisions of the Supreme Court, following which so many 3-judge courts have assumed jurisdiction over like cases, that no substantial Federal question is presented by this appeal which would entitle appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that this appeal be dismissed, or that the judgment and decree of the Court below be affirmed.

Respectfully submitted,

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Robert E. Steiner, Jr.,
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Attorneys for Louisville and Nashville Railroad Company, Appellee.

Steiner, Crum & Baker,
Montgomery, Alabama,
Of Counsel.

APPENDIX "A"

ALABAMA STATUTES

All citations are to the Code of Alabama of 1940.

Abandonment of Service:

Title 48, section 35.

"No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application, and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

Title 48, section 106.

"No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

Time for Decision:

Title 48, section 77.

"The commission shall within ninety days after the completion of the hearings and arguments, if any, and the filing of briefs, if any, in any case submitted to it, or upon a rehearing thereof, decide said cause, or if for any good and valid reason it shall be unable to decide the same

within said period, then at the expiration of said ninety day period, the commission shall make and file and serve upon all the interested parties a written order stating its reason for its inability to decide said cause within said time, and may extend the time for decision for a period not to exceed ninety days."

Penalty Statutes:

Title 48, section 78.

"In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein."

Title 48, section 163.

"Every violation of the provisions of this chapter, or of any order, decision, rule, regulation, direction, or requirement of the commission, or any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission, or failure of any officer, agent, or employee of any transportation company acting within the scope of his official duties or employment shall in every case be deemed to be the act, omission or failure of such transportation company."

Title 48, section 399.

"Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense.

Title 48, section 400.

"Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

Supersedeas:

Title 48, section 84.

"No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof,

upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to grant such rates, fares or charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file, with the clerk of said court a bond, which bond shall be as hereinafter provided."

UNITED STATES STATUTES

U. S. Code, Title 28, section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

U. S. Code, Title 28, section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

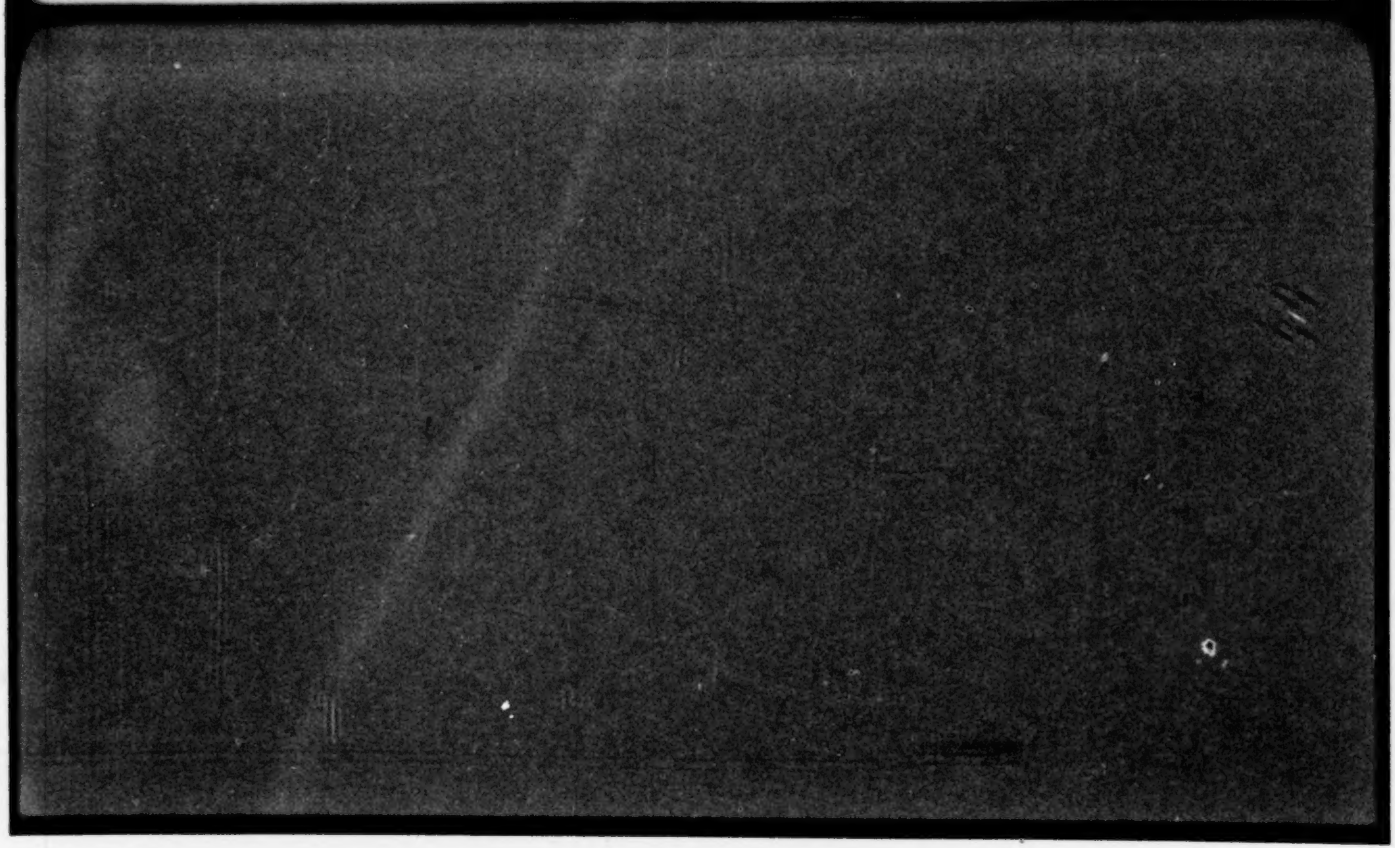
"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or

order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

[redacted]



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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 712-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff-Appellee

vs.

ALABAMA PUBLIC SERVICE COMMISSION, C. C. (JACK) OWEN, AS ITS PRESIDENT, and JIMMY HITCHCOCK AND T. O. WALKER, ASSOCIATE COMMISSIONERS, AND SI GARRETT, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court, the findings of fact, conclusions of law, judgment and decree, are reported in 94 F. Supp. 893.

Jurisdiction

The judgment of the District Court was entered on January 19, 1951. A petition for appeal is presented to the District Court herewith, to-wit, on March 14, 1951. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code may be taken from the final decree made by such specially constituted District Court. It is further provided by Title 28, Section 2101(b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railway may not discontinue service unless it first obtains a certificate from the State Public Service Commission allowing such discontinuance, and after hearing and consideration the Commission declines to grant such certificate and the railway files a complaint asking an injunction of a three-judge Federal Court:

a. Does a three-judge Federal Court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three-judge Federal Court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought is an injunction enjoining the Public Service Commission and other state officers from enforcing any penalties or remedies provided under state law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming arguendo that there is jurisdiction for a three-judge federal court, should the court abstain from exercising it to enjoin enforcement of state criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the state law?

d. Assuming arguendo that there is a jurisdiction for a three-judge federal court, should the court abtain from exercising its jurisdiction in recognition of the wisdom of allowing state courts to try questions of local state policy relating to complicated questions of fact?

e. Where the suit is to enjoin the Alabama Public Service Commissioners and the Attorney General of Alabama from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the State because of the failure to observe the provisions and requirements of the order of the Commission, and where there has been no suit on the part of the Commissioners or the Attorney General to enforce said order, is the suit against the Commissioners and the Attorney General in substance against the State of Alabama, and, therefore, barred by the United States Constitution, Amendment XI?

f. May a three-judge federal court properly find that confiscation had resulted because of losses on a branch railroad line, without considering the effect of those losses on the overall financial operations of the railroad system as a whole?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 34, 35, 50, 51, 76, 77, 78, 79, 81, 82, 83, 84, 86, 88, 90, 94, 95, 96, 97, 98, 104, 105, 106, 110, 399, 400, 405; United States Code, Title 28, Sections 1253, 2101(b), 2281 and 2284. The said stat-

utory provisions, or pertinent parts thereof, are set out verbatim or appropriately summarized in Appendix "A" to the Jurisdictional Statement in No. 89, October Term, 1951.

Statement

Appellee has operated trains between Selma, Alabama and Flomaton, Alabama as part of its railroad system. By petition filed on December 16, 1949, appellee petitioned the Alabama Public Service Commission (hereinafter referred to as the "Commission") for permission to discontinue the operation of train Nos. 64 and 65 operating between the above cities, pursuant to the requirements of Title 48, Sections 35 and 106, Code of Alabama 1940, which require that no transportation company shall abandon any of its service to the public without first filing application for permit to abandon service and obtaining from the Commission a permit allowing such discontinuance. On March 22, 1950 the application was heard by the Commission. On Sept. 20, 1950 the Commission entered an order denying appellee's application for authority to discontinue the branch line in question, it being alleged by the appellee that said order of the Commission was not received by appellee until October 7, 1950. Appellee did not apply for rehearing under Title 48, Section 76, Code of Alabama 1940; appellee did not appeal from the Commission's order, pursuant to Title 48, Sections 79 et seq., Code of Alabama 1940; appellee did not sue for an injunction in the Alabama courts, pursuant to Title 48, Sections 94 et seq., Code of Alabama 1940. Nor did appellee attempt to avail itself of the supersedeas provisions in the Alabama statutes (Title 48, Sections 81 and 84, Code of Alabama 1940). Sec. 82 of Title 48, supra, provides that the appellate court shall hear the case upon the certified record and shall set aside the order of the Com-

mission if the court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based on findings of fact contrary to the substantial weight of the evidence.

Instead, appellee filed a complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved and upon diversity of citizenship, and asked for convocation of a district court of three judges for a hearing pursuant to the United States Code, Title 28, Secs. 2281 and 2284. Appellee alleged that the revenues received from the operation of the trains in question were disproportionate to the expenses and that the continuation of such trains was not required by public convenience and necessity. There were further allegations that the Commission's order deprived appellee of its property without due process of law, that appellee was being denied equal protection of the laws, that interstate commerce was burdened by the order of the Commission, and that the order was unjust and confiscatory. Appellee also averred that it had exhausted all of its administrative remedies.

Paragraph 4 of the complaint contained a purely frivolous attack on the constitutionality of Title 48, Secs. 35 and 106, Code of Alabama 1940, appellee not asking for an adjudication of the constitutionality of those statutes. Defendants-appellants filed three motions with the three-judge federal court. First, defendant filed a motion to stay the call of a three-judge district court; second, a motion to stay the proceedings in the three-judge district court; and third a motion to dismiss the cause of action. The court, in its final judgment of January 19, 1951, overruled each motion. A hearing was also had and evidence taken and the

case submitted on appellee's prayer for a permanent injunction. In its final decree of January 19, 1951, the three-judge court held that the order of the Public Service Commission denying permission to discontinue the trains in question was null, void, and of no effect, and the court vacated that order. The court further ordered, adjudged and decreed that the defendants, together with their successors in office, and their agents, servants, and attorneys be permanently enjoined from taking any steps or proceedings of any nature whatsoever against the appellee, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff-appellee, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the order of the Commission by discontinuing the daily operation of the trains in question.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised in several cases before this Court:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496 (1941);

Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943);

Beal et al. v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45 (1941);

Ex parte Bransford, 310 U. S. 354 (1940);

Chicago v. *Fieldcrest Dairies*, 316 U. S. 168 (1942);

Meredith v. *Winter Haven*, 320 U. S. 228 (1943);

Stainback v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949);

Ford Motor Co. v. *Department of Treasury*, 323 U. S. 459 (1945);

Spector Motor Service v. *McLaughlin*, 323 U. S. 101 (1944);
Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 (1947);
A. F. of L. v. *Watson*, 327 U. S. 582 (1946).

There are involved the same fundamental issues of how far the federal judiciary has jurisdiction over local questions which can be adjudicated by state courts, and to what extent federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of state courts. The decision of the three-judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that federal courts will stay their hand on local matters until the state courts have ruled.

In addition, there is involved a fundamental issue of whether or not this suit by the appellee against the Alabama Public Service Commission and the Attorney General of Alabama is, in substance, against the State of Alabama, and thus barred by the Eleventh Amendment of the United States Constitution. Further, there is involved the question of whether or not the three-judge federal court has erred in its decision that the order of the Alabama Commission works a confiscation of the railroad's property without due process of law, when the three-judge court has not considered the effect of the branch line losses on the overall system financial operations.

I. The action of the three-judge district court, assuming jurisdiction in this cause, was in violation of the Eleventh Amendment of the United States Constitution. Alabama had not waived its immunity against such suit. It was not

alleged in the complaint that the officials of the State of Alabama were enforcing, or seeking to enforce, unconstitutional state statutes (the allegations of unconstitutionality were admittedly frivolous and, therefore, may be disregarded). The State action, which the railroad seeks to have enjoined in the federal courts, is potentially future action and it is not certain that such action will occur. The railroad seeks to have enjoined the Commissioners and the Attorney General from proceeding in the name of the State of Alabama to enforce penalties or remedies provided under the laws of the State because of the railroad's failure to continue the operation of the trains in question. It is submitted that such an attack does not bring the railroad within an exception to the Eleventh Amendment prohibition. This potential future action, which the railroad seeks to have enjoined, would constitute action by the officers as the State of Alabama. The officials would not be acting in their individual capacities.

Ford Motor Co. v. *Department of Treasury*, 323 U. S. 459 (1945);

Cf. Beal v. *Missouri Pacific R. Corp.*, 312 U. S. 45 (1941);

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949);

Chicago R. I. and P. R. Co. v. *Long et al.*, (8th Cir. 1950) 181 F. 2d 295.

II. The decision below is in conflict with *Beal et al.* v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State

and withdrawing the determination of the legal question involved from the state courts whose appointed function it is to decide it. In the present case the railroad has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact there has been no move on the part of any state officer to enforce the statute at all. rendered in the state court causing large penalties to be The case also notes that even if an adverse decision were assessed against the railroad, such penalties might well be the consequence of violation of state law.

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the state.

Shipman v. *Dupre,* 339 U. S. 323 (1950);
Railroad Commission of Texas v. *Pullman Co.,* 312 U. S. 496 (1941);
Burford v. *Sun Oil Co.,* 319 U. S. 315 (1943);
Chicago v. *Fieldcrest Dairies,* 316 U. S. 168 (1942);
A. F. L. v. *Watson,* 327 U. S. 582 (1946);
Township of Hillsboro v. *Cromwell,* 326 U. S. 620 (1945);
Stainback v. *Mo Hock Ke Lock,* 336 U. S. 368 (1949);
Cf. Meredith v. *Winter Haven,* 320 U. S. 228 (1943);
Cf. Gulf Oil Corp. v. *Gilbert,* 330 U. S. 501 (1947);

The same thread runs through all of the above cases, that to avoid needless friction with state policies the federal judiciary should exercise a wise discretion giving due regard to the rightful independence of the state government and the smooth working of the federal judiciary. This is especially so where the railway is actually seeking to escape the impact

of statutes, the constitutionality of which it admits is properly for consideration by the Supreme Court of the State.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided state law involved. But *Burford* v. *Sun Oil Co., supra*, indicates that there is no such limitation, so long as there are "basic problems of state policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and Alabama courts is made clear by the fact that this is the one of a series of such cases by railroads filed in the same judicial district, seeking the same relief.

The three-judge district court erred in finding confiscation in violation of due process without determining the effect on the system operations as a whole of losses on the branch line in question. See: *A. P. S. C.* v. *Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. 2d 449 (1950).

Conflicts dangerous to the success of state policies have resulted from the intervention of the lower federal court in the case at bar. It has issued permanent injunctions against action by Alabama administratative officials regarding the railroad lines here involved. No conceivable changed circumstances would mitigate a contempt citation if Alabama administrative officials took such future action. The lower court has substituted its independent judgment for that of the Alabama Commission. Yet, the Alabama legislature, in a carefully devised regulatory scheme, had severely limited the scope of the review which the Alabama courts may exercise over actions of the Alabama Public Service Commission. See: Tit. 48, Secs. 79 et seq., Code of Alabama 1940; *Avery Freight Lines* v. *Persons*, 250 Ala. 40, 32 So. 2d 886 (1947); *Alabama Public Service Comm.* v.

Atlantic Coast Line R. Co., 253 Ala. 559, 45 So. 2d 449 (1950). And neither the appellee, Louisville and Nashville Railroad Company, nor the lower court has attacked the Alabama review procedures as inadequate.

Respectfully submitted,

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JUN 1 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 90

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

W. A. Northcutt,
Robert E. Steiner, Jr.,
Sam Rice Baker,
Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action 712-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION; GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF ALABAMA,

Defendants

APPELLEE'S MOTION TO DISMISS OR AFFIRM AND STATEMENT AS TO JURISDICTION

Appellee, Louisville and Nashville Railroad Company, believing that the matters set forth below demonstrate the lack of substance in the questions raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee also files this its motion to dismiss the appeal, or in the alternative to affirm the judgment of the court below on the ground that the questions raised by appellants are unsubstantial.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal, appellee asserts that the unsubstantial character of the grounds stated by appellants is so apparent as to warrant this court in summarily disposing of this appeal without further hearing. Appellee further shows that the judgment of the court below must, in any event, be affirmed upon the findings of that court as to the confiscatory character of the order of Alabama Public Service Commission sought to be enforced by appellants, but enjoined by the court below.

I

Statement of the Issues on Appeal

Only procedural questions are raised in this appeal by appellants. Appellants have not raised any issue as to the correctness of the decision of the court below on the merits or facts in its holding that the contested order of Alabama Public Service Commission was confiscatory and unconstitutional.

The procedural and only issues involved in this appeal are:

(a) Since the complaint prayed for an interlocutory and permanent injunction to restrain the confiscatory and unconstitutional order of Alabama Public Service Commission under an Alabama statute, was a 3-judge court the proper tribunal to hear and decide the case?

(b) Since confiscation of plaintiff's property by the order of Alabama Public Service Commission was alleged and proved, should the 3-judge Federal Court surrender its jurisdiction to state courts where no speedy, plain, and efficient remedy was afforded therein?

(c) Where all material facts showing that the order of Alabama Public Service Commission was confiscatory and unconstitutional were proved, should the

Federal Court abandon or decline jurisdiction because in moulding its decree against the enforcement of such confiscatory and unconstitutional order, incidental relief was granted by enjoining the enforcement of state penalty statutes which would otherwise be applicable to plaintiff-appellee upon its failure or refusal to comply with such order?

(d) Is a proceeding to protect rights guaranteed by the Constitution of the United States from the impact of a confiscatory order of Alabama Public Service Commission a suit against the State of Alabama?

II

Statement of Facts

The facts leading to this litigation are as follows:

For many years, Louisville and Nashville Railroad Company, plaintiff-appellee, has operated passenger trains Nos. 64 and 65 between Selma, Alabama, and Flomaton, Alabama, entirely within the State of Alabama. In recent years, the operation of these trains has resulted in increasingly large losses because of the competition of other forms of transportation, particularly that of buses and privately owned motor vehicles. L & N could not discontinue trains 64 and 65 until it received authority from Alabama Public Service Commission, as required by Title 48, Sections 35 and 106, Alabama Code of 1940 (see appendix). If it had discontinued such service without authority, L & N and its officers would be subject to the heavy penalties provided by the applicable Alabama statutes (see appendix).

On December 15, 1949, L & N filed its application with Alabama Public Service Commission for authority to discontinue these trains in order to eliminate the very heavy losses involved in their operation. After a delay of over three months, the Alabama Commission set the case for hearing on the merits on March 22, 1950. Petitioner intro-

duced evidence in proof of its case, and the Commission took the case for an order. Under the law of Alabama (Title 48, Sec. 77 Code of Alabama 1940; see appendix), the Alabama Commission is required to decide all cases submitted to it within 90 days from submission, provided that it can extend the time for decision an additional 90 days "for good cause shown." In spite of the delay that had already occurred, and in spite of the heavy losses involved, the Commission extended the time for decision an additional 90 days, which expired on September 20, 1950. Appellee requested immediate action on several occasions, but the Commission did not decide the case until October 14, 1950, when appellee received the order, although the order was back dated to September 20, 1950. The Commission decided the case on the merits, and denied appellee permission to discontinue the trains. The loss, as found by the 3-judge court was $6,000.00 per month, so that the delay of the Commission in deciding the case cost appellee around $60,000.00, which loss is irreparable, and which, under the Commission's order, must continue; hence the urgent need for immediate relief by injunction from the 3-judge Federal Court.

Having futilely pursued its "administrative remedies" for 10 months without relief, appellee then sought relief by filing its complaint in the Federal Court praying for an interlocutory and permanent injunction, on the ground that the order of the Alabama Commission required the continued operation of these passenger trains, violated the 14th Amendment of the Constitution of the United States by taking its property without due process of law, by confiscating its property without just compensation; and violated Article 1, Section 8, of the Constitution of the United States by imposing an unreasonable burden on interstate commerce and on interstate freight and passenger rates.

Incidental and ancillary to the primary relief of enjoining the Alabama Commission's order requiring the continued operation of these passenger trains, appellee sought also to enjoin the Commission and the Attorney General of Alabama from enforcing the heavy penalties and sanctions provided by the statutes of Alabama (see appendix) for failure to comply with orders of Alabama Public Service Commission.

By the provisions of 28 U. S. C. A., Sections 2281 and 2284 (see appendix) and the unbroken line of decisions construing these sections, a proceeding to set aside or enjoin the enforcement of an order of a state administrative board or commission, as violative of the United States Constitution, requires the more solemn statutory 3-judge court as distinguished from the District Judge sitting alone. Such court was convened, and by stipulation of the parties the case was submitted on the merits for final decree and injunction as well as on the prayer for an interlocutory injunction. After hearing and considering the evidence, the 3-judge court held the Alabama Commission's order to be confiscatory and unconstitutional, and enjoined defendants from enforcing it or any penalties or sanctions against the railroad because of the discontinuance of the two passenger trains involved.

Appellants seek to contend that the 3-judge court erred in not considering the effect of the losses from these passenger trains on the operation of the system as a whole, but such effort is abortive. The 3-judge court did consider this and found the losses "burdensome" and appellants did not appeal from, and therefore cannot review, this or any other finding of fact.

The Court in its findings, opinion, and order held that the order of the Commission was illegal and confiscatory and deprived L & N of its rights guaranteed by the United

States Constitution. No appeal has been taken from that finding. This case is reported in 94 F. Supp., 893.

III

No Substantial Federal Question Is Presented

Appellants at the outset question the jurisdiction of the 3-judge District Court, on the theory that since appellee did not attack the constitutionality of a state "statute", but instead attacked the constitutionality of the "order" of Alabama Public Service Commission requiring the continued operation of Trains 64 and 65, there was no jurisdiction in the 3-judge court pursuant to section 2281, Title 28, U. S. C. (See appendix).

Section 2281 was formerly section 380 of Title 28, U. S. C., or section 266 of the Judicial Code.

This feigned issue was decided against the State's contention in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S., 290, 292, 67 L. Ed. 659, 661 (1923), in the clearcut opinion written by Mr. Justice Holmes for a unanimous court:

> "A doubt has been suggested whether these cases are within Section 266 of the Judicial Code, Act of March 3, 1911, chap. 230, 36 Stat. at L. 1086, 1162, as amended by the Act of March 4, 1913, chap. 160, 37 Stat. at L. 1013, Comp. Stat. section 1243, 5 Fed. Stat. Anno. 2d ed. p. 984. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state'; but did not change the statement of the ground, which still reads, 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the

unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. Louisville & N. R. Co. v. Finn, 235 U. S. 601, 604, 59 L. Ed. 379, 382, P. U. R. 1915A, 121, 35 Sup. Ct. Rep. 146; Phoenix R. Co. v. Geary, 239 U. S. 277, 280, 281, 60 L. Ed. 287-289, 36 Sup. Ct. Rep. 45; Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, November 20, 1922 (260 U. S. 212, ante 217, 43 Sup. Ct. Rep. 75); Western & A. R. Co. v. Railroad Commission, February 19, 1923 (261 U. S., 264, ante, 645, 43 Sup. Ct. Rep. 252). The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 301, 318, 58 L. Ed. 229, 238, 244, 34 Sup. Ct. Rep. 48; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. Ed. 721, 725, 34 Sup. Ct. Rep. 364; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. Ed. 786, 787, 31 Sup. Ct. Rep. 537. But it plainly was intended to enlarge, not to restrict, the law. We mention the matter simply to put doubts to rest."

Other railroads, similarly situated, have applied for and received identical relief from 3-judge Federal courts convened in various states and jurisdictions in the following cases:

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D. C., E. D. Michigan, July 6, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 91 F. Supp. 980 (D. C., M. D. Alabama, July 20, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 88 F. Supp. 441 (D. C., M. D. Alabama, Feb. 8, 1950);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners of Montana*, 78 F. Supp. 1010 (D. C. Montana 1947);

Atlantic Coast Line R. R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp., 675 (D. C., E. D. South Carolina 1948);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 (D. C. Montana 1942);

Great Northern Ry. Co. v. *Nagle*, 16 F. Supp. 532 (D. C. Montana 1936);

Delaware, L. & W. R. Co. v. *Van Santvoord et al.*, 232 F. 978 (D. C., N. D. New York 1916);

Mississippi Railroad Commission v. *Mobile & O. R. Co.*, 244 U. S., 388, 61 L. Ed. 1216 (1917);

Atlantic Coast Line R. R. Co. v. *Ala. Public Service Commission*, 92 F. Supp. 579 (D. C., M. D. Alabama, Aug. 23, 1950);

Louisville & N. R. Co. v. *Ala. Public Service Commission*, 93 F. Supp. 544 (D. C., M. D. Ala. 1950);

Louisville & N. R. Co. v. *Ala. Public Service Comsion*, 94 F. Supp. 892 (D. C., M. D. Ala. 1950);

Atlantic Coast Line R. R. Co. v. *Fla. R. R. & P. U. Commission*, (D. C. N. D. Fla. March 19, 1951; Case No. 302 Civ. T.).

Obviously these courts were unanimous in their opinion that a 3-judge Federal court had jurisdiction, since in none of those cases was there any dissenting opinion or any hint of doubt that such jurisdiction existed.

Other cases in which the United States Supreme Court held proper the convening of a 3-judge Federal court to enjoin an order of a state administrative board or commission, following Mr. Justice Holmes in the *Oklahoma Natural Gas* case, are:

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375 (1932);

Herkness v. Irion, 278 U. S. 92, 73 L. Ed. 198 (1928);

Driscoll v. Edison Lt. & Pr. Co., 307 U. S. 104, 83 L. Ed. 1134 (1938);
Corporation Commission of Oklahoma v. Cary, 296 U. S. 452, 80 L. Ed. 324 (1935);
Mountain States Power Co. v. Public Service Commission, 299 U. S. 167, 81 L. Ed. 99 (1936).

The order of the Alabama Commission sought to be enjoined by appellee was found and held by the court below to be confiscatory and violative of the 14th Amendment of the Federal Constitution. Appellee had suffered such confiscation, awaiting the hearing of its petition to discontinue these trains and the Commission's delayed decision. It was entitled to a plain, speedy, and efficient remedy to relieve it from further confiscation.

> "Present confiscation is not atoned for by merely holding out the hope of a better life to come."
> Mr. Justice Cardozo in West Ohio Gas Co. v. P. U. Comm. of Ohio, 294 U. S. 79, 83, 79 L. Ed. 773, 777.

It sought and obtained such relief in a Federal Court. In this appeal, the Alabama Commission has not challenged the correctness of the decision of the court below on the merits and the facts of the case that, under the evidence, the order of the Alabama Commission was confiscatory and illegal. Certainly appellants cannot contend that its order challenged and complained of in the court below "had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property, and unreviewable through the judicial power of the Federal Government. If this extreme position could be deemed to be well taken, it is manifest that the fiat of [Alabama Public Service Commission], and not the Constitution of the United States, would be the supreme law of the land".—Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. C. 378, 397, 77 L. Ed. 375, 385.

Undoubtedly, this was a case for a 3-judge court. Even if we were to assume that the 3-judge court did not have jurisdiction over the case, the proceedings before it and its order and judgment would not be void, and the Supreme Court would not order the case dismissed, but would simply reverse and remand the case for an order by the single judge of the District Court below.—*Phillips* v. *U. S.*, 312 U. S. 246, 85 L. Ed. 800 (1941). That Judge was a member of the 3-judge court, and it was he who wrote the opinion of that court in this case. Obviously, he would reach the same conclusion if he were deciding the case alone. Therefore, what does it profit the Alabama Commission to appeal solely from the procedure—not complaining of or attacking the correctness of the decision of the court below on the merits and facts of the case—other than further delay? If appellants contend that this case was one for decision by a single District Judge sitting as a District Court, rather than one for a 3-judge court, then obviously the same result or decision would be reached. If appellants contend that even a single District Judge sitting as a District Court had no jurisdiction over the case, then the entire system of concurrent Federal jurisdiction over violations of the Federal Constitution would cease.

Appellants next contend that the Federal Court should have declined to exercise jurisdiction in this case for reasons of comity.

> "Rules of comity or convenience must give way to constitutional rights. • • •
>
> "*As in our opinion the District Court had jurisdiction and a duty to try the question* whether a preliminary injunction should issue, and as that question has not yet been considered, the cases should be remanded to that court, with directions to proceed to the trial." [Emphasis supplied.]
>
> Mr. Justice Holmes in Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 293, 67 L. Ed. 659, 662.

Other cases holding that the Federal Court properly exercises jurisdiction in cases involving confiscation and Federal constitutional questions are:

Corporation Commission of Oklahoma v. Cary, 296 U. S. 452, 80 L. Ed. 324 (1935);
Mountain States Power Co. v. Public Service Comm. of Montana, 299 U. S. 167, 81 L. Ed. 99 (1936).

Section 2284(5) of Title 28, U. S. C., furnishes the test of when proceedings in the Federal Court should be stayed, namely, when like proceedings are pending in a state court having jurisdiction thereover. Here, no such proceedings were or are pending in the State courts of Alabama.

Appellants rely heavily on those cases where the Federal courts, in the exercise of their discretion, have abstained from interfering with a state's policy of conserving its own natural resources, as for example the oil proration case of *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424. These cases are *sui generis* and have no application here.

There has been no authoritative declaration by the courts of Alabama that appellee has the right to supersede an order of the Alabama Public Service Commission in a train discontinuance case under the provisions of Title 48, Section 84 (see appendix), and no statement or admission to that effect by the Attorney General of Alabama can in any way bind the courts of Alabama. Thus it cannot be said that appellee's remedies in the state court are "plain" or "efficient". Appellee sought relief from the state administrative body for ten months without avail. It sought and obtained relief from the Federal District Court in approximately 55 days. No further comment need be made as to whether state remedies are as "speedy" as Federal in this case. The time for taking an appeal in the state court has expired, so that remedy, so strongly

argued by appellants, is non-existent and hence irrelevant. Furthermore, where confiscation is alleged and proved under the Federal Constitution, nothing can preclude the jurisdiction of Federal Court thereover.

The allegations of appellee in its complaint, and the findings and decision of the court below that the order of the Alabama Commission was confiscatory and unconstitutional are unchallenged in this appeal. Thus the contention of appellants that the court below should decline to exercise jurisdiction because of "complicated questions of fact" is entirely without merit. There is no novel question of state law or state policy involved in this case. There was and is involved in it the question of confiscation under the Federal Constitution. As to the policy of the State, that was decided in *Alabama Public Serv. Comm.* v. *A.C.L.R. Co.*, 45 So. (2d) 449, 451 (Ala. Sup. Ct. March, 1950), where the Court said:

> "There is no other railroad service in that area. There is a good hard surface road and bus service for passengers in all directions, with one truck freight common carrier. *The passenger patronage would not demand a continuance of the railroad service.*" [Emphasis supplied.]

This case is the sixth of a series of like cases in which the Alabama Commission has arbitrarily and unconstitutionally ordered railroads to continue unprofitable passenger service in spite of the policy laid down by the Alabama Supreme Court; and in all of them such orders have been enjoined by a 3-judge court. The Alabama Commission, by its order in this case, has ignored the pronouncement of the Alabama Supreme Court and the decisions of the 3-judge courts, and it now asks the Supreme Court to make the order of the Alabama Commission, even though confiscatory, supreme by surrendering jurisdiction.

As to enjoining penalties or sanctions: Appellants complain that the court below enjoined them from undertaking to apply any penalties or sanctions against appellee for its failure or refusal to continue the operation of the trains in question. In fact, appellants contend that a Federal Court has no right to enjoin the enforcement of a state criminal law. Such is not an issue here, nor is it involved. The relief sought by appellee's complaint, and the real relief granted by the 3-judge court below, was against confiscation of appellee's property, which would have resulted from requiring the continued operation of trains with such heavy financial losses. The court below found and decided that appellee was entitled to relief, and accordingly enjoined the enforcement of the order of the Alabama Commission. Obviously such relief would be ineffectual if appellee, or its representatives, could be harassed by penalties or prosecutions under any penalty statutes of Alabama for failure to comply with the Alabama Commission's order, which order the court below had set aside and held to be illegal and confiscatory. By this action, the court below made its decree effective.

Clearly this action comes under the well defined exception established by this Court in the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451, 71 L. Ed. 1146, 1150 (1927):

> "• • • But an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate (citing other U. S. Supreme Court cases)."

A similar holding is *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 49, 85 L. Ed. 577, 579 (1941). See also *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 79 L. Ed. 1322 (1935).

Finally, and apparently as an afterthought, appellants here for the first time argue that this proceeding is a suit against the State of Alabama. That such contention is patently without merit is expressly held in *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714.

Appellee further submits that questions presented in this appeal have been so definitely determined by decisions of the Supreme Court, following which so many 3-judge courts have assumed jurisdiction over like cases, that no substantial Federal question is presented by this appeal which would entitle appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that this appeal be dismissed, or that the judgment and decree of the Court below be affirmed.

Respectfully Submitted,

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APPENDIX

ALABAMA STATUTES

All citations are to the Code of Alabama of 1940

Abandonment of Service:

Title 48, section 35.

"No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application, and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

Title 48, section 106.

"No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

Time for Decision:

Title 48, section 77.

"The commission shall within ninety days after the completion of the hearings and arguments, if any, and the filing of briefs, if any, in any case submitted to it, or upon a rehearing thereof, decide said cause, or if for any good and valid reason it shall be unable to decide the same within said

period, then at the expiration of said ninety day period, the commission shall make and file and serve upon all the interested parties a written order stating its reasons for its inability to decide said cause within said time, and may extend the time for decision for a period not to exceed ninety days."

Penalty Statutes:

Title 48, section 78.

"In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein."

Title 48, section 163.

"Every violation of the provisions of this chapter, or of any order, decision, rule, regulation, direction, or requirement of the commission, or any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission, or failure of any officer, agent, or employee of any transportation company acting within the scope of his official duties or employment shall in every case be deemed to be the act, omission or failure of such transportation company."

Title 48, section 399.

"Any utility doing business in this state, or any of its authorized agents, officers, or employees, who is guilty of

knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense."

Title 48, section 400.

"Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

Supersedeas:

Title 48, section 84.

"No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to grant such rates, fares or charges, or any of them,

or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided."

UNITED STATES STATUTES

U. S. Code, Title 28, section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

U. S. Code, Title 28, section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders,

at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such

statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

PER

CURIAM

MR. JUSTICE JACKSON adhere to the views expressed in their concurring opinion in *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 351, as to the jurisdictional issue in these cases. *Si Garrett*, Attorney General of Alabama, *M. Roland Nachman, Jr.* and *Wallace L. Johnson*, Assistant Attorneys General, for appellants. *Robert E. Steiner, Jr.* and *Sam Rice Baker* for appellee. Reported below: 94 F. Supp. 892, 893.

No. 99. THORP v. BOARD OF TRUSTEES, NEWARK COL-

Nos. 89 and 90. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Appeals from the United States District Court for the Middle District of Alabama. *Per Curiam:* Judgments reversed. *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341. MR. JUSTICE FRANKFURTER and